

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DIANNA J. STROER
Claimant

VS.

U.S.D. 490
Respondent

AND

KANSAS ASSOCIATION OF SCHOOL BOARDS
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 190,133

ORDER

On March 21, 1996 the application of the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark on December 1, 1995, came on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, Robert R. Lee of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Stephen McManus of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Cortland Q. Clotfelter of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board. The stipulations as specifically set forth in the Award of the Administrative Law Judge are adopted insofar as they are not inconsistent with the comments herein below. The Administrative Law Judge showed a stipulated date of accident from January 19, 1993 through December 16, 1993. Claimant's Form E-1, originally filed in this matter, alleged a starting date of accident of January 9, 1993 and an ending date of accident of December 3, 1993. The amended Form E-1 filed by claimant

alleged an ending date of December 16, 1993. During the taking of the stipulations at regular hearing, respondent raised issue regarding claimant's average weekly wage and requested, on page 6 of the transcript, that if claimant was claiming an hourly rate of \$6.11 per hour, a second accident date of December 16, 1993 be included, indicating two accident dates were in contention. The Appeals Board finds two dates of accident to be appropriate in this matter, one on January 9, 1993 and a series through December 16, 1993, and will proceed accordingly.

Further, the Administrative Law Judge found \$290.37 to be the stipulated average weekly wage, a finding which the Appeals Board rejects. From the record it appears that an average weekly wage for January 9, 1993 was in dispute. Further, the stipulated average weekly wage of \$290.37 included fringe benefits of \$25 per week, which were provided to claimant through August 1994, subsequent to claimant's receipt of 40.43 weeks temporary total disability compensation. The Appeals Board finds claimant's average weekly wage for January 9, 1993 and for the period ending on December 16, 1993 will be at issue in this matter. In all other respects, the stipulations of the Administrative Law Judge contained in the Award are adopted by the Appeals Board.

ISSUES

- (1) Did the Administrative Law Judge err in awarding temporary total disability benefits to claimant for the injuries in question?
- (2) What are claimant's dates of injury with the respondent?
- (3) The average weekly wages of claimant on the alleged dates of injury.
- (4) What, if any, is the nature and extent of claimant's injury and/or disability?
- (5) What, if any, is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

On January 9, 1993, while pulling trash through the snow, claimant fell, suffering accidental injury arising out of and in the course of her employment with respondent. Claimant reported this accident, was off work for a short period of time and received 7.43 weeks temporary total disability compensation at the rate of \$151.40 per week. Claimant returned to work in early March 1993 and, due to claimant's ongoing symptomatology, was placed in light accommodated work by respondent. It was noted at the time claimant returned to work she had been released from her restrictions by Dr. Poole. Nevertheless, claimant continued to experience pain and was provided accommodated work. Respondent submits an average weekly wage of \$232.59 for a date of injury of January 9, 1993 and the Appeals Board adopts same as appropriate in this award. This computes to a temporary total rate of \$155.07 per week. The Appeals Board further finds claimant suffered accidental injury arising out of and in the course of her employment on January 9, 1993, while employed with respondent. The medical report of Dr. Lawrence R. Blaty

indicates a 5 percent permanent partial whole body functional impairment prior to claimant returning to work in March 1993. Claimant testified that before January 9, 1993, she was asymptomatic. The Appeals Board finds the 5 percent functional impairment attributable to claimant's January 9, 1993 injury.

Thereafter claimant returned to work for respondent, working in an accommodated position through December 16, 1993, when claimant was forced, due to her ongoing symptomatology, to leave respondent's employment. Claimant was then paid an additional 33 weeks temporary total disability compensation at the rate of \$171.73 per week. Claimant's wage, on December 16, 1993, included a \$6.11 hourly rate which, at 40 hours per week, equates to regular time pay of \$244.40 per week. Evidence also indicated claimant earned \$20.98 per week overtime. This equates to \$265.38 average weekly wage for the date of injury of December 16, 1993. The evidence further indicates \$25 per week was paid by respondent for claimant's health insurance, through August 1994. This loss of benefits occurred after the payment of claimant's temporary total disability compensation. K.S.A. 44-511 allows fringe benefits to be included in the average weekly wage only when they are no longer being provided to claimant. As such, claimant's average weekly wages prior to September 1994 cannot include the \$25 health insurance fringe benefit still being provided by respondent. The Appeals Board finds claimant's average weekly wage for December 16, 1993 to be \$265.38 and further finds the appropriate temporary total disability rate for this period of time to be \$176.93 per week.

The Appeals Board finds, for the injury of January 9, 1993, and based upon an average weekly wage of \$232.59, claimant was underpaid temporary total in the amount of \$3.67 per week for 7.43 weeks totalling \$27.27. The Appeals Board further finds for the injury of December 16, 1993, and based upon an average weekly wage of \$265.38, claimant was underpaid 33 weeks of temporary total disability in the amount of \$5.20 per week totalling \$171.60.

In proceedings under the Workers Compensation Act it is the burden of claimant to establish claimant's right to an award of compensation by proving the various conditions on which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 as amended by S.B. 649 (1996) and K.S.A. 44-508(g) as amended by S.B. 649 (1996).

K.S.A. 1992 Supp. 44-510e states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds that subsequent to claimant's January 9, 1993 injury she returned to work for respondent in an accommodated position at an average weekly wage comparable to or higher than the wage claimant was earning at the time of the original injury. As such, claimant is not entitled to work disability as the Appeals Board finds the presumption of K.S.A. 1992 Supp. 44-510e has not been overcome for this injury.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

The medical report of Dr. Blaty established claimant's 5 percent preexisting functional impairment which the Appeals Board has adopted as appropriate in this matter. Thereafter, claimant returned to work at a comparable wage. The Appeals Board finds claimant is entitled to only to her functional impairment of 5 percent from the injury occurring on January 9, 1993.

Subsequent to this injury, claimant returned to work with respondent in an accommodated position, worked until December 16, 1993 and suffered additional injury arising out of and in the course of her employment. Claimant then left work due to her ongoing physical problems, was paid an additional 33 weeks temporary total disability compensation and has not returned to work with respondent. The Kansas Legislature, on July 1, 1993, amended the language of K.S.A. 44-510e(a) to read as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

Dr. Lawrence R. Blaty was provided two separate task analyses to consider. He first considered the Task Performance Capacity Assessment and found that the analysis was appropriately done and, as such, the 63 percent loss of task performing ability contained therein was proper under the circumstances. Dr. Blaty was then provided a second report prepared by Ms. Karen Terrill. In that report, Ms. Terrill analyzed the nearly identical job and task history of the claimant and, using a time weighted analysis, opined claimant had suffered a 46.1 percent loss of task performing ability over the previous 15 years as a result of the injuries suffered on December 16, 1993. Dr. Blaty, after reviewing this information, felt the analysis used by Ms. Terrill also to be appropriate and found the 46.1 percent loss of task performing abilities to be proper under the circumstances. The Appeals Board is presented with a quandary. However, the evidence in the record is sufficient for the Appeals Board to analyze the conflicting reports and decide which should be provided the greater weight. The Appeals Board finds the opinion of Dr. Blaty, in analyzing and adopting the time weighted opinions of Karen Terrill, as appropriate evidence upon which to grant claimant a work disability. The Appeals Board finds that claimant has suffered a loss of task-performing abilities of 46.1 percent.

K.S.A. 44-510e requires the claimant's task loss be averaged together with the difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage claimant was earning after the injury. In this instance, respondent offered claimant a job within her restrictions that would have paid \$181.66 per week. The Administrative Law Judge, in considering this evidence and in considering the logic of Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), found that claimant, in refusing to accept this job, had violated the spirit of the Workers Compensation Act. As such the Administrative Law Judge imputed the wages from the offered job to the claimant's ability to earn wages and, in comparing that to claimant's average weekly wage at the time of the injury, felt claimant had suffered a wage loss of 37 percent. The Appeals Board finds this analysis to be proper and adopts the Administrative Law Judge's opinions in granting claimant a 37 percent wage loss.

K.S.A. 44-510e requires an averaging of the two above criteria. The Appeals Board, in combining claimant's 46.1 percent loss of task performing ability with her 37 percent loss

of wages, finds claimant has suffered a 41.55 percent permanent partial general body disability as a result of the injuries suffered on December 16, 1993.

K.S.A. 44-501(c) states in part:

“The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.”

Claimant was assessed a 5 percent permanent partial functional impairment from the injury occurring on January 9, 1993. The Appeals Board finds that respondent is entitled to a reduction of the 5 percent functional impairment from claimant's earlier injury. The Appeals Board, therefore, awards claimant a 36.55 percent permanent partial general body disability as a result of the injuries suffered December 16, 1993.

The Appeals Board must next decide the issue of Fund liability.

The purpose of the Workers Compensation Act is to encourage employment of persons handicapped as a result of specific impairments by relieving employers wholly or partially of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the Act if the employee is “afflicted with an impairment of such a character as to constitute a handicap in obtaining or retaining employment.” Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

In order for an employer to be relieved of liability either in whole or partially from the Workers Compensation Fund, it is the employer's responsibility and burden to show that it hired or retained a handicapped employee after acquiring knowledge of a preexisting impairment. K.S.A. 44-567(b).

The employer has the burden of proving it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In this instance, the medical evidence shows claimant to have suffered a preexisting impairment which resulted in her being assessed a 5 percent functional impairment by Dr. Blaty. Claimant then suffered additional injury which, according to Dr. Blaty, increased the claimant's functional impairment to 8 percent.

K.S.A. 44-567(a)(2) states in part:

“[W]henever a handicapped employee is injured or is disabled or dies as a result of an injury and the administrative law judge finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the administrative law judge shall determine in a manner which is equitable and

reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers compensation fund."

Dr. Blaty was asked, on more than one occasion during his deposition, whether he felt claimant would have suffered the accident on December 16, 1993 had it not been for her preexisting impairment. Dr. Blaty testified the condition claimant suffered would have occurred regardless of the preexisting impairment, but he felt there was a definite contribution from the preexisting impairment. The evidence supports a finding that respondent knowingly retained a handicapped employee in its employment after learning of the claimant's handicap and that claimant's December 16, 1993 injury would have occurred regardless of claimant's preexisting handicap but the preexisting handicap did contribute to the resulting disability. The Award of the Administrative Law Judge in assessing 62.5 percent of the costs associated with this Award to the Kansas Workers Compensation Fund and 37.5 percent of the costs associated with this Award against the respondent, is supported by the evidence and testimony of Dr. Blaty, and the Appeals Board adopts said finding as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated December 1, 1995, should be, and is hereby modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dianna J. Stroer, and against the respondent, U.S.D. 490, and its insurance carrier, Kansas Association of School Boards, for accidental injuries occurring January 9, 1993 and a series of accidental injuries occurring through December 16, 1993.

For the injury occurring on January 9, 1993, and based upon an average weekly wage before September 1, 1994, of \$232.59 per week and from September 1, 1994 forward, based upon an average weekly wage of \$257.59 per week, claimant is entitled to 7.43 weeks temporary total disability compensation at the rate of \$155.07 per week totalling \$1,152.17, followed thereafter by 78.14 weeks permanent partial functional impairment at 5% in the amount of \$7.75 per week, totalling \$605.59, followed thereafter by 329.43 weeks permanent partial functional impairment of 5% at the rate of \$8.59 per week, totalling \$2,829.80, for a total award of \$4,587.56.

As of April 5, 1996, there would be due and owing to claimant 7.43 weeks temporary total disability compensation at the rate of \$155.07 per week totaling \$1,152.17, followed by 78.14 weeks permanent partial functional impairment at 5%, and based upon an average weekly wage of \$232.59 in the amount \$7.75 per week, totalling \$605.59, followed thereafter by 83.29 weeks permanent partial functional impairment based upon an average weekly wage of \$257.59 per week, at the rate of \$8.59 per week totalling \$715.46, for a total of \$2,473.22 which is due and owing in one lump sum minus amounts previously paid.

Thereafter, claimant is entitled to 246.14 weeks permanent partial functional impairment at the rate of \$8.59 per week in the amount of \$2,114.34, until fully paid or until further order of the Director.

For the injury of December 16, 1993, claimant is entitled to 33 weeks temporary total disability compensation at the rate of \$176.93 per week, totalling \$5,838.69, followed

thereafter by 4 weeks permanent partial general body disability based upon an average weekly wage of \$265.38 in the amount of \$176.93 totalling \$707.72. Thereafter, based upon an average weekly wage of \$290.38, claimant is entitled to 143.64 weeks permanent partial general body disability at the rate of \$193.60 per week totalling \$27,808.70, for a total award of \$34,355.11.

As of April 5, 1996, claimant would be entitled to 33 weeks temporary total disability compensation at the rate of \$176.93 per week, totalling \$5,838.69, followed by 4 weeks permanent partial general body disability at the rate of \$176.93 per week totalling \$707.72 (based upon an average weekly wage of \$265.38), followed by 83.14 weeks permanent partial general body disability at the rate of \$193.60 (based upon an average weekly wage of \$290.38 per week), in the amount of \$16,095.90 for a total due and owing of \$22,642.31, which is ordered paid in one lump sum minus amounts previously paid.

The respondent is entitled to reimbursement of 62.5% of all costs, expenses and fees associated with this injury from the Kansas Workers Compensation Fund.

Thereafter, claimant is entitled to 60.50 weekly permanent partial general disability at the rate of \$193.60 totalling \$11,712.80, until fully paid or further order of the Director.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and the Kansas Workers Compensation Fund to be directly paid as follows:

Barber & Associates	
Transcript of Preliminary Hearing	\$142.70
Transcript of continuation of Regular Hearing	\$314.40
Deposition of Barbara Rathbun	\$165.60
Deposition of Marlene Kilgore	\$132.85
Deposition of Gene Russell	\$224.50
Ireland Court Reporting	
Transcript of Regular Hearing	\$133.05
Deposition of Lawrence Blaty, M.D.	\$168.00
Deposition of Lawrence Blaty, M.D.	\$383.00
Deposition Services	
Transcript of Motion Hearing	\$ 88.10
Angela J. Schultz, C.S.R.	
Deposition of John Heim	\$112.00

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Stephen McManus, Kansas City, KS
Cortland Q. Clotfelter, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director